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No. 80-419

In The

Supreme Court of the United States

October Term, 1980

STATE OF ARIZONA,

Petitioner,

vs.

MARICOPA COUNTY MEDICAL SOCIETY, MARICOPA FOUNDATION FOR MEDICAL CARE, and PIMA FOUNDATION FOR MEDICAL CARE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is an agreement among competing physicians establishing fee schedules for their individual services a per se violation of Section 1 of the Sherman Act?

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INTEREST OF AMICI CURIAE

The States of Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina,

South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and the Commonwealth of Kentucky respectfully submit this brief *amici curiae* in accordance with Supreme Court Rule 36 in support of petitioner the State of Arizona on writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The respective Attorneys General of these numerous sovereign states are charged with the responsibility of enforcing state antitrust provisions similar or identical to the Sherman Act.[1] These various state antitrust laws are construed in accordance with this Court's interpretation of the federal antitrust laws.[2] Therefore, this Court's determination in this case will directly affect the *amici* states' enforcement of state laws pertaining to restraints of trade and will have an impact far beyond the question of federal law presented herein.

The United States Congress has previously provided for increased state antitrust enforcement through the appropriation of substantial funds to the various state Attorneys General for the purpose of development and expansion of antitrust enforcement capabilities. 42 U. S. C. § 3701 (1976). Congress has also enhanced the enforcement capabilities of the various state Attorneys General through legislation authorizing states to sue as *parens patriae* to recover damages for citizens injured by violations of the Sherman Act. 15 U. S. C. § 15 (c) (1976).

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[1] E. g., Neb. Rev. Stat. § 59-1603 (Cum. Supp. 1978), Ill. Rev. Stat., ch. 38, § 60-30, et seq. (1979); 6 Del. Code Ann. § 2113 (Supp. 1979); Md. Com. Law Code Ann. § 11-202(a)(2) (1975).

[2] E. g., Neb. Rev. Stat. § 59-829 (Cum. Supp. 1978) *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 716, 144 N. W. 2d 1, 9 (1976).

Given these increased enforcement capabilities and responsibilities, the *amici* states have a direct interest in this Court's interpretation of the standard which should be applied to price fixing activities by professional groups.

The *amici* states are also concerned with the skyrocketing costs of medical care. A decision in the present case establishing a separate standard of antitrust liability for the medical care industry would seriously affect the costs which citizens of the *amici* states are required to pay for proper medical services.

For these various reasons, the *amici* states have direct and substantial interests in the proper resolution of the question presented in this case. Therefore, the *amici* states support petitioner the State of Arizona in this appeal on writ of certiorari to the Ninth Circuit.

QUESTION PRESENTED

Is an agreement among competing physicians establishing fee schedules for their individual services a per se violation of Section 1 of the Sherman Act?

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U. S. C. § 1 provides, in pertinent part:

> Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

SUMMARY OF ARGUMENT

The respondents' fee agreements in the present case constitute price fixing. As such, those agreements are clearly illegal per se under the precedent established by this Court. The Ninth Circuit's consideration of the reasonableness of respondents' prices and the Ninth Circuit's apparent recognition of a learned profession exemption in this case ignore the clear directive of Section 1 of the Sherman Act and the well-settled decisions of this Court. The Ninth Circuit should be reversed.

ARGUMENT

I.

The Supreme Court has consistently held that private agreements regarding price are per se unlawful under the Sherman Act. In the present case, the challenged conduct of the respondents constitutes price fixing and is thus per se unlawful.

Over the years, this Court has consistently and repeatedly held that agreements among competitors to fix prices constitute a per se violation of Section 1 of the Sherman Act. *National Society of Professional Engineers v. United States*, 435 U. S. 679 (1978), *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927). As recently as last year, the Court again restated this basic premise in *Catalano, Inc. v. Target Sales, Inc.*, 446 U. S.

643 (1980). Clearly, any agreement or combination "found for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing . . . price . . . is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 223 (1940).

In the present case, the courts below found that respondents and their members set, by majority vote, the maximum amount to be paid member physicians who agree to provide services to patients enrolled in insurance plans approved by the respondents.[3] Furthermore, 85 to 95 percent of the physicians in Maricopa County bill at or above the maximum reimbursement levels set by the respondents,[4] and the respondents have admitted that their member doctors expected concerted price increases as a requisite for continued membership in the foundations.[5] These facts indicate clear and simple price fixing. As Judge Larson noted in his well-reasoned dissent, "it is clear that these activities constituted maximum price-fixing by competitors. Disregarding any 'special industry' facts, this conduct is per se illegal."[6]

As a form of price fixing, respondents' activities are per se unlawful under the cases cited above. However, the Ninth Circuit held that the relevant test of respondents' activities involved consideration of their "impact on com-

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[3]Petitioner's Petition for Writ of Certiorari, Appendix A at 2, Appendix D at 39.

[4]*Id.*, Appendix A at 3.

[5]Petitioner's Petition for Writ of Certiorari, Appendix A at 29-30, Joint Appendix at 326, 334, 336.

[6]Petitioner's Petition for Writ of Certiorari, Appendix A at 20.

petitive conditions."[7] From this language in this Court's decision in *National Society of Professional Engineers v. United States*, 435 U. S. 679 (1978), the Ninth Circuit concluded that a rule of reason analysis was appropriate in the present case. That conclusion is incorrect.

While *Professional Engineers* does indicate that the ultimate test of an agreement's legality is its impact on competitive conditions, the Court's opinion directs that a rule of reason analysis should not be applied when the trade restriction results in the fixing of rates or prices by private agreement.[8] In addition, *Professional Engineers* succinctly describes the two necessary categories of antitrust analysis. The first category includes agreements whose nature and effect are so plainly anticompetitive that no industry study is necessary to establish their illegality. These agreements are illegal per se and their "impact on competitive conditions" is *presumed*. In the second category are agreements whose competitive effect can only be evaluated by a more elaborate study of the industry involved. In this category, a rule of reason analysis is necessary to determine if an anticompetitive impact is present. In the case at bar, the conduct of the respondents constitutes price fixing and is per se illegal. Contrary to the view of the Ninth Circuit, its "impact on competitive conditions" is presumed and no further analysis is necessary.

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[7] *Id.*, Appendix A at 4.

[8] This Court later affirmed the nonapplicability of the rule of reason in *Professional Engineers*, stating that:

> [A]n agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer was held unlawful without requiring further inquiry.

Catalano, Inc. v. Target Sales, Inc., 446 U. S. 643, 647 (1980).

The Ninth Circuit also characterized the respondents' activities in the present case as a form of maximum fee agreement and refused to apply a per se rule to those activities based upon its perception that case law is unsettled regarding the proper rule for maximum price agreements in a horizontal setting.[9] The decisions of this Court, however, clearly establish that combinations fixing maximum prices are illegal per se. *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), *Albrecht v. Herold Company*, 390 U. S. 145 (1968). Moreover, the language in *Kiefer-Stewart* condemning maximum price fixing was directed towards prices fixed by *horizontal* competitors. Thus, horizontal agreements setting maximum prices are per se illegal. The instant case clearly illustrates the compelling economic underpinning of such a per se rule. As predicted in *Albrecht v. Herold Co., supra*, respondents' supposed maximum prices fixed by agreement have, in reality, become minimum prices in that 85 to 95 percent of the physicians in Maricopa County are charging at or above the respondents' maximum fee schedules.[10]

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[9]Petitioner's Petition for Writ of Certiorari, Appendix A at 7.

[10]Although the courts below characterized the conduct at issue as "maximum" price fixing, respondents' fee schedules also constitute *minimum* price fixing in at least one further very important respect. Health insurance companies are the real consumers of respondents' services. Health insurance companies who want to market foundation-approved plans may not use a fee schedule lower than the one adopted by respondents. For example, member physicians might collectively decide that a given procedure should be compensated up to $1,000. If a health insurance company wished to reimburse that same procedure only up to $800, the foundation would refuse to endorse the plan. Accordingly, from the perspective of the health insurance company and the individuals who ultimately pay the premiums, respondents' fee schedule clearly operates as a form of minimum price fixing.

This Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979), also does not suggest a rule of reason analysis in the present case. In *Broadcast Music*, the Court considered a system of blanket musical licenses which was *sui generis* and which allowed independent negotiations with individual copyright holders concerning fees for the use of musical compositions. The case at bar does not concern a unique fee arrangement for the delivery of health services, and the respondents' fee agreements do not allow independent negotiations between health insurers and respondents' member physicians. The case at bar further concerns agreements regarding price which were not at issue in *Broadcast Music* where this Court again reaffirmed that, "agreements among competitors to fix prices on their individual goods and services are . . . within the *per se* category." *Id.* at 8.

Respondents in the present case are engaged in simple price fixing. Such conduct should be held to constitute a per se violation of Section 1 of the Sherman Act under the well-settled decisions of this Court.

II.

The Supreme Court has consistently held that the reasonableness of an agreed-upon price is not a defense to a price fixing charge under the Sherman Act. In the present case, the Ninth Circuit erred in considering such a defense relative to the challenged conduct of the respondents.

Over 50 years ago, this Court held that agreements to set prices are per se illegal under the Sherman Act

without consideration of whether the resulting prices are reasonable. *United States v. Trenton Potteries Co., supra.* This principle has been consistently applied in other decisions of this Court,[11] and recently the Court stated, "It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc. v. Target Sales, Inc., supra* at 647. Clearly, the act of setting prices by private agreement offends the Sherman Act without consideration of whether those prices are themselves reasonable or unreasonable in a given economic setting.

In spite of this established precedent, the Ninth Circuit based its opinion, in part, upon a consideration of the reasonableness of the prices set by the respondents.[12] In his majority opinion, Judge Sneed stated, "[t]he relevant inquiry becomes whether fees paid to doctors under that system would be less than those payable under the FMC maximum fee agreement."[13] Furthermore, Judge Sneed suggested that determination of the legality of the respondents' challenged conduct should include consideration of whether respondents' activities were "devices to enable member doctors to capture a greater share of potential

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[11]*E. g., National Society of Professional Engineers v. United States, supra.*

[12]Respondents claim that the Ninth Circuit did not rely on a reasonableness of price defense. This claim is refuted by the language of Judge Sneed's majority opinion cited above.

[13]Petitioner's Petition for Writ of Certiorari, Appendix A at 6.

monopoly profit,"[14] consideration of how other insurers "fix their fee schedules in the relevant geographical area,"[15] and consideration of the "present supply and demand functions and those which would exist under ideal competitive conditions."[16] These various considerations suggested by Judge Sneed go directly to the reasonableness of the prices set by the respondents. Such considerations are totally irrelevant in the price fixing context of this case. By mandating such reasonableness inquiries, the Ninth Circuit has deviated from the clear rule established by the decisions of this Court. That precedent dictates rejection of any such "reasonableness defense."

III.

The Supreme Court has refused to establish a separate standard of antitrust liability for the "learned professions" in cases involving direct restraints on prices. The Ninth Circuit erred in establishing a separate antitrust liability standard for doctors.

Prior to the Court's decision in *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), some confusion might have existed as to the existence of a so-called "learned profession" exemption from the antitrust laws. However, *Goldfarb* unequivocally establishes that no such sweeping exemption exists. A profession's price fixing activities are now clearly illegal per se under the Sherman Act. Similarly, in *National Society of Professional Engineers v.*

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[14] *Id.*, Appendix A at 6.

[15] *Id.*, Appendix A at 8.

[16] *Id.*, Appendix A at 6.

United States, supra, the Court recognized that "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement" when that agreement relates to prices to be charged by a profession. *Id.* at 692. Applying a learned profession exemption to price related activities thus flies in the face of the standard enunciated by this Court.

In his opinion for the Ninth Circuit majority, Judge Sneed chose to focus upon the nature of the health care industry in holding that a per se analysis was inappropriate in the present case. He stated:

> The health care industry, moreover, presents a particularly difficult area. The first step to understanding is to recognize that not only is access to the medical profession very time consuming and expensive both for the applicant and society generally, but also that numerous government subventions of the costs of medical care have created both a demand and supply function for medical services that is artificially high.[17]

Judge Sneed also concluded his opinion by noting this Court's statement in *Professional Engineers* and *Goldfarb* that marketing restraints involving professional competition may be acceptable under a rule of reason analysis where similar restraints involving ordinary business competition are not.[18] Judge Sneed's opinion thus indicates that the Ninth Circuit chose to analyze the industry involved in the case at bar rather than the nature of respondents' conduct, and that the Ninth Circuit recognized a learned profession exemption based upon its perception

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[17] *Id.*, Appendix A at 6.

[18] *Id.*, Appendix A at 12.

of *Professional Engineers* and *Goldfarb*. Those cases, however, stand for the proposition that the correct focus for antitrust analysis is the nature of a challenged practice rather than the characteristics of a particular industry. Those cases further establish that price fixing is illegal per se regardless of the fact that a profession is involved. There is no learned profession exemption from the Sherman Act when, as in the case at bar, the challenged activities directly relate to price. The Ninth Circuit's apparent recognition of a separate standard of antitrust liability for respondent physicians' price agreements contravenes the clear rule established by the decisions of this Court.

The recognition of a learned profession exemption from the antitrust laws in this case is of special concern to the *amici* states. From an enforcement standpoint, if a professional group is free to establish fee schedules unless the states can prove they are unreasonable, it simply will not be practical for the *amici* states to prosecute such cases. Furthermore, if learned professions can fix reasonable price standards for their members, how can the Attorneys General of the various *amici* states advise state officials of the proper standards to follow in regulating professional conduct? Can state bar associations now poll their members and adopt maximum fee schedules? Can real estate brokers now use the state real estate commission to establish uniform fee guidelines? What "professions" regulated by state law qualify for the exemption? The *amici* states respectfully submit that application of a rule of reason standard and recognition of a learned profession exemption in the case at bar will seriously erode

the ability of the states to preserve the competitive forces of the free marketplace.

CONCLUSION

For the foregoing reasons, the *amici* states respectfully submit that the holding of the United States Court of Appeals for the Ninth Circuit should be reversed and that respondents' conduct should be considered per se illegal under the terms of the Sherman Act.

Dated this 3rd day of June, 1981.

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